IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1255

JAMES C. ANDERS, APPELLANT,

versus

JESSE J. FLOYD, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, COLUMBIA DIVISION

JURISDICTIONAL STATEMENT FOR JAMES C. ANDERS

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Appellant, the defendant in the district court, appeals from the judgment of the United States District Court of South Carolina, Columbia Division, entered December 20, 1977, and submits this statement to show that this Court has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the district court (Appendix A, *infra.*) is reported in 440 F. Supp. 535.

JURISDICTION

This suit was initiated on August 27, 1975; the plaintiff sought relief under 42 U. S. C. § 1983 and 28 U. S. C. § 2201. The district court's jurisdiction over the plaintiff's allegations rested on 28 U. S. C. § 1343.

Subsequent to the filing of the complaint, the Chief Judge of the Fourth Circuit, pursuant to 28 U. S. C. § 2284, constituted a district court of three judges (Haynsworth, Ch. C. J., Russell, C. J., and Chapman, D. J.) to hear and determine this case. Designation of a three-judge court was required by 28 U. S. C. § 2281,[1] because plaintiff sought to enjoin the operation of portions of §§ 44-41-10, *et seq.*, 1976 Code of Laws of South Carolina [2] (Appendix B, *infra*), the South Carolina abortion statute.

The three-judge court implied or determined in an opinion filed on November 4, 1977, that the South Carolina abortion statute was unconstitutional facially or as applied to a particular abortion performed by the plaintiff, that a part of § 44-41-20(c) was facially unconstitutional in requiring consultation among physicians and the husband's consent in certain situations, and that § 44-41-30(c) also was facially unconstitutional in requiring parental consent for minors under 16.[3] The Court also held that *Roe v. Wade*, 410 U. S. 113 (1973) precluded a homicide prosecution in connection with the aforementioned abortion performed by plaintiff. The Court's final judgment and injunction was entered on December 20, 1977 (Appendix C, *infra*). The Defendant filed a timely notice of appeal to this Court on January 10, 1978 (Appendix D, *infra*).

The jurisdiction of this Court to review the judgment of the court below is conferred by 28 U. S. C. § 1253. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Turner v. Fouche*, 396 U. S. 346 (1970); *Allen v. State Board of Elections*, 393 U. S. 344 (1969); *Flast v. Cohen*, 392 U. S. 83 (1968).

[1] This action predates the 1976 amendments to 28 U. S. C. § 2281.

[2] §§ 33-682 *et seq.*, under the 1962 codification in effect when the suit was brought.

[3] Appellant does not appeal the holdings concerning the consulting-physician requirement and the parental and spousal consent requirements.

QUESTIONS PRESENTED

1. Whether the Missouri statutory definition of viability (the point when life can be "continued indefinitely outside the womb") approved in *Planned Parenthood v. Danforth*, 428 U. S. 52 (1976), is the only constitutionally permissible definition of viability in light of *Roe v. Wade*, 410 U. S. 113 (1973), which defines viability as the point when a fetus is "potentially able to live outside the mother's womb?"

2. Whether any constitutional definition of viability supports a conclusion that a child which is born as the result of an abortion and lives for 20 days is not viable as a matter of law?

3. Whether the lower court should have abstained when proposed indictments had been submitted to a state grand jury before any hearing in the district court, where no bad faith was proven, and where the South Carolina abortion statute under which the prosecution was proceeding was not "flagrantly and patently unconstitutional?"

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of the Fourteenth Amendment to the Constitution of the United States; Section 1979 of the Revised Statutes of the United States, 42 U. S. C. § 1983; and Sections 44-41-10 and 44-41-20, of the 1976 Code of Laws of South Carolina are set forth in Appendix B.

STATEMENT

A. Proceedings below.

The plaintiff, now appellee, in this action is Jesse T. Floyd, M.D., "a physician specializing in abortions," [4] whom the defendant, the prosecutor for Richland County (Columbia), South Carolina, sought to indict for illegal abortion and homicide. Dr. Floyd alleged that the abortion for which indictments were being sought was protected by *Roe v. Wade,* 410 U. S. 113 (1973) and that as a result any prosecution connected with that abortion was precluded. A temporary injunction was issued by the district judge on August 28, 1975, by which time the proposed indictments had been submitted to the state grand jury. The complaint was later amended to seek declaratory relief with respect to parts of the South Carolina abortion statute which required, in certain instances, parental consent (§ 44-41-30 (b)), spousal consent (§ 44-41-20(c)) and consultation among physicians (*Id.*).

Discovery in the case consisted primarily of depositions taken by Dr. Floyd's counsel on the question of prosecutorial bad faith. In addition a deposition of the principal draftsman of the abortion statute was taken.

The case was argued before the three-judge panel on November 4, 1976. The court issued an opinion on November 4, 1977, and a final order and injunction on December 20, 1977.

B. The abortion.

In the spring of 1974, Louise, an unmarried woman twenty years of age, became concerned that she might be pregnant.[5] She visited a general practitioner in April, 1974, and was cursorily examined by a nurse, but was merely

[4] App. A, p. 1a.

[5] Dep. of "Louise Doe" (pseudonym), p. 7.

given some medicine which in some cases causes the menstrual period to start.[6] This proved ineffective, but Louise did nothing further until July 19, 1974, when she visited the Richland County Health Clinic and was there diagnosed by a Dr. Kanitkar as being 18 to 20 weeks pregnant.[7] After consulting with a social worker as to what to do next, Louise visited Dr. Floyd's clinic on July 31, 1974. The evidence conflicts as to the estimate which Dr. Floyd gave Louise on that occasion. In his examination notes Dr. Floyd wrote that she was twenty weeks pregnant at the time, but Louise has testified that he told her she was 16 to 17 weeks pregnant.[8] Except for Louise's testimony that on subsequent visits Dr. Floyd continued to tell her that she was "on the borderline of going into the hospital," [9] there is nothing in the record to indicate whether he made any further estimate of the length of the pregnancy in the five weeks which were to ensue before the abortion was attempted.[10]

On September 4, 1974, Louise entered the hospital to have the abortion performed. Late that evening Dr. Floyd gave her a prostaglandin injection to induce the expulsion of the fetus,[11] and apparently left her shortly thereafter.[12] Labor began an hour later and continued for over 24 hours; it culminated on September 6, 1974, when Louise, alone in her hospital room, gave birth to a male infant. She rang for

[6] *Id.*, at p. 9.

[7] Kanitkar Dep., p. 17. (16 to 18 weeks from conception). Unless otherwise noted herein, all references to number of weeks will be to "gestational age," which is computed from the last menstrual period. See L. Hellman & J. Pritchard, Williams Obstetrics 199 (14th Ed. 1971).

[8] Dep. of "Louise Doe," p. 21.

[9] *Id.* at p. 26. The meaning of this statement, if in fact it were made, is unclear since Louise by any estimate was well past the point at which § 44-41-20(b) requires abortions to be performed in a hospital or certified clinic.

[10] Dr. Floyd contended below (Br. for Plaintiff, p. 5) that a quota on abortions at Richland Memorial Hospital was responsible "in large part" for the five-week delay. There are indications in the record that the quota system was not in effect throughout most of August, 1974 (Khoury Dep. p. 5); but even if it had been, it bore no relation to the possible criminality of the abortion.

[11] Garrett Dep., Ex. 5, p. 1.

[12] See Affidavit of "Louise Doe", p. 3 (Cook Dep., Ex. 2).

the nurse. Several nurses entered the room, one of whom asked Louise whether she knew the baby was a "seven month baby." [13] The child[14] was thereupon taken to the neonatal intensive care unit, where he was found to weigh 1,049 grams.[15] Twenty-four hours later, Dr. Floyd made his first visit to Louise in the two and one-half days since the injection and said of the infant, in Louise's words, "that he thought there was a slight chance of him living but he did not think he was going to live." [16] Louise was discharged the following day and recovered without incident.

C. Postnatal care of the child.

The child lived for twenty days following his premature birth. Throughout this period, he was in the neonatal intensive care unit, alternating between being in relatively sound condition and being in crisis.[17] Bowel difficulties and blockages led to surgery on September 19, 1974, when the child was almost two weeks old.[18] A temporary improvement occurred, but the bowel condition ultimately led to peritonitis. On September 26, 1974, the child died at 20 days of age; the pathologist who performed the autopsy testified in his deposition that death was caused by the numerous complications which arose from the child's premature birth.[19]

D. Estimates of the child's gestational age.

There appears to be general agreement that birth weight, 1,049 grams in this instance, is the principal source

[13] Dep. of "Louise Doe," p. 45.

[14] The nature of this case presents obvious difficulties in referring to the subject of the abortion. However, the lower court used the term "child" several times in its opinion when describing the subject's postpartum life (see App. A, p. 3a) and that usage will be followed herein. The term "fetus" will be used in referring to the prenatal stage.

[15] See Garrett Dep., Ex. 5, p. 1.

[16] Affidavit of "Louise Doe," p. 3 (Cook Dep., Ex. 2).

[17] See Garrett Dep., Ex. 5 (summary of clinical and laboratory data).

[18] *Id.*

[19] Garrett Dep., p. 37.

of information as to the gestational age of a newborn.[20] The importance of gestational age in this case is that it provides a standard for determining Dr. Floyd's opportunity to know that the fetus which he attempted to abort was likely to be viable.

Aside from Dr. Floyd, only one other physician, the aforementioned Dr. Kanitkar, examined Louise before the abortion. Dr. Kanitkar estimated that she was 18 to 20 weeks pregnant.[21] When Dr. Floyd saw Louise two weeks later, his estimate was 20 weeks. However, five weeks elapsed before the abortion was performed, and Dr. Kanitkar testified that if he were faced with the possibility of performing an abortion toward the end of the second trimester, he would conduct an ultrasound examination, a more accurate method of determining gestational age than the abdominal and pelvic examinations used in this case.[22]

Dr. Antoinette Wall was the one deponent who saw the infant immediately after its birth and who was asked about the gestational age at birth; although Dr. Wall recognized the usual possibilities of erring several weeks either way, she testified that her opinion was that the infant was around 26 weeks gestation.[23] Another physician in the neonatal intensive care unit was not asked about a specific number of weeks, but did state that she had "seen many babies that

[20] See, *e.g.*, Silverman, Ed., *Perinatal Pediatrics*, p. 15: "BIRTH WEIGHT. This is the most consistently and accurately recorded datum available for use in evaluating the growth of the fetus; and as a single observation made at birth, it is the most valuable one."

[21] Kanitkar Dep. pp. 10-11 (16-18 weeks from conception, which translates to 18-20 weeks gestational age).

[22] The availability of sonography in Columbia at the time is disputed in the record (cf. Dennis Dep. p. 17 and Horger Affidavit, p. 5). Also in dispute is the utility of the procedure. However, one of Dr. Floyd's expert witnesses has co-authored a textbook chapter which states:

> "[S]onography appears to be more reliable overall when compared with clinical examination. Therefore, the use of sonography in the late second trimester may avoid the inappropriate termination of pregnancies beyond 22 weeks gestation." [The 22-week limit was imposed at the facility at which the study was conducted.]
>
> Attachment to Affidavit of Theodore M. King, M.D., p. 13.

[23] Deposition of Antoinette W. Wall, M.D., p. 13.

have been born at this weight and condition that have lived." [24]

One other deponent who saw the infant was Dr. Charles Garrett, the pathologist who performed the autopsy. His conclusion, based primarily on norms set out in medical treatises, was that an infant whose birth weight was 1,000 grams would fall between 26 and 30 weeks gestational age, with the mean at 28 weeks.[25]

Dr. Floyd produced, approximately one month prior to the hearing before the three judge court in early November, 1976, affidavits of seven physicians, none of whom had seen the infant or the mother.[26] Their affidavits emphasized the variability of fetal ages which a given birth weight can signify.

E. **The prosecution.**

Shortly after the child's death, the Executive Director of the hospital in which the abortion was performed wrote the then Solicitor (prosecuting attorney) of Richland County, enclosing the medical records in the case and referring the matter "for whatever disposition that your office would desire to make," in light of the abortion statutes.[27] No action was taken by the prosecutor and no reasons why are in the record, although the district judge has noted that at the time the prosecutor was a lame duck with only two and one-half months to serve.[28]

[24] Affidavit of Annette P. Johnson, M.D., p. 4 (Ex. 9 to Cook Dep.)
[25] Garrett Dep., p. 16.
[26] Over a year before, Mr. Anders had served interrogatories which inquired concerning the existence of such witnesses as the seven physicians; Dr. Floyd's original answer named no one and were never supplemented despite the provisions of Rule 26(e)(1), F. R. C. P. Although several of the affidavits were executed in June or July, 1976, their existence was not made known to Anders until early October.
[27] Cook Dep., Ex. 10. On the day after the infant's birth, the Executive Director of Richland Memorial Hospital ordered that Dr. Floyd's privileges at the hospital be suspended. The OB/GYN staff later ratified this decision after a hearing. Wyman Dep., p. 7.
[28] Transcript of Hearing, 8/28/75, p. 21.

In April, 1975, attorneys for the hospital called the new prosecutor, Mr. Anders, to remind him of the hospital's letter to his predecessor. This was the first Mr. Anders had heard of the matter.[29] He ordered an investigation by several different individuals, which resulted in numerous sworn statements being taken.

The facts revealed in the investigation led Mr. Anders to conclude that there existed sufficient grounds for indictments.[30] Accordingly, he decided to seek an indictment for abortion as well as one for murder, the liveborn infant having died as the result of an act by Dr. Floyd.

On the morning of August 28, 1975, the case was presented to the Richland County Grand Jury by a State Law Enforcement Division official who had investigated the matter.[31] The grand jury's usual practice was to vote on each case immediately after the presentation;[32] it did so in this case and voted to indict on both grounds.[33] However, this and all other indictments voted upon on August 28, 1975, were not reported out in open court until the following morning.[34]

On August 27, 1975, one day prior to the presentation to the grand jury, Dr. Floyd had filed his complaint in the district court seeking to enjoin any anticipated state court proceedings. However, Mr. Anders had not personally received the complaint before the case went to the grand jury the following morning (August 28).[35] The federal hearing which resulted in the issuance of a temporary injunction occurred on the afternoon of August 28. The injunction held the state proceeding in abeyance until December 20,

[29] Anders Dep., pp. 7-8.
[30] Anders Dep., pp. 26-29.
[31] Cook Dep., p. 47.
[32] Dep. of Arthur Taylor (Grand Jury Foreman), pp. 5-6.
[33] *Id.*
[34] *Id.*
[35] Transcript of Hearing, 8/28/75, p. 29.

1977, when the district court made the injunction permanent.

F. **Opinion of the district court.**

In its opinion (issued on November 4, 1977, several weeks before the final judgment and permanent injunction were entered), the district court held that the timing of the commencement of the state and federal proceedings was immaterial because the prosecution was brought when "it should have been obvious to the prosecutor that there was no possibility of his obtaining a conviction that could have been constitutionally sustained." (App. A, p. 5a.) This, the court held, constituted bad faith as defined by *Younger v. Harris,* 401 U. S. 37 (1971). The lower court's conclusion was based on *Roe v. Wade,* 410 U. S. 113 (1973), sustaining the mother's right to terminate her pregnancy so long as the fetus is not viable, and on the court's conclusion that "[s]eemingly, the child was not viable in the sense that he could live indefinitely outside his mother's womb, but he did have the capacity to live for twenty days, as he did." App., A. p. 3a.

The Questions Are Substantial

The lower court's decision warrants plenary review. The definition of "viability" employed by the court below permits the destruction of fetuses which, under *Roe v. Wade,* 410 U. S. 113 (1973), are viable and the proper subjects of compelling state interest. Moreover, the decision denies protection of law to infants born alive after an abortion—persons under the United States Constitution, the common law and the laws of the State of South Carolina.

This is the only decision in the nation which has had occasion to apply an abortion statute to a procedure performed upon a fetus in the latter stage of pregnancy where

viability is possible, if not probable.[1] Thus, the risk exists that its definitional errors will be magnified as physicians and courts look to it for guidance.

Even if the instant case were to have no impact beyond the State of South Carolina, the lower court's opinion is impenetrably vague in its discussion of that part of the state abortion statute under which a prosecution for the abortion of a viable fetus might be brought. The opinion does not disclose under what circumstances a state prosecution might be had, if at all, and any such prosecution would surely lead to another federal action for an injunction in view of the confusion created over the present integrity of the abortion statute by the court below. This is so even though this Court has determined that nontherapeutic abortions performed upon viable fetuses may be proscribed by the state. *Roe,* 410 U. S. at 163-164.

Further, the lower court clearly misapplied the "bad faith" and "flagrant and patent unconstitutionality" exceptions to the doctrine of federal abstention in *Younger v. Harris,* 401 U. S. 37 (1971). The prosecutor was held to have acted in "bad faith" because he failed to foresee that the lower court would apply a standard of viability contrary to statute and to this Court's definition in *Roe,* 410 U. S. at 160, when the infant victim survived the abortion by 20 days and had the birthweight of a viable fetus. The lower court apparently held South Carolina's abortion statute "flagrantly and patently violative of express constitutional prohibitions * * *"[2] without ever holding it facially unconstitutional in relation to the time after which it proscribed abortion (although even facial unconstitutionality is sufficient to enjoin a state prosecution under *Younger; see* 401 U. S. at 54).

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[1] *Commonwealth v. Edelin,* 359 N.E. 2d 4 (Mass. 1976), involved only a prosecution for manslaughter, there being no Massachusetts abortion legislation in effect at the time of the indictment.

[2] App. A, p. 6a.

The lower court's opinion thus contravenes settled principles of federalism, while denying the State's compelling interest in protecting a class of viable fetuses, as it may validly do under *Roe*. This was accomplished in such a confusing manner that the need for clarification will make further federal-state conflicts inevitable.

I. The District Court erred by applying the Missouri statutory definition of "viability," rather than the definition of this Court in Roe v. Wade, 410 U. S. at 160, and erroneously concluded that an infant born as the result of an abortion and who survived 20 days was not viable as a matter of law.

A. **The District Court erroneously defined viability.**

In *Roe v. Wade*, 410 U. S. 113, 160 (1973), this Court held that viability is reached when a fetus is "potentially able to live outside the mother's womb, albeit with artificial aid." This definition was repeated in *Planned Parenthood of Missouri v. Danforth*, 428 U. S. 52, 64 (1976). But in the instant case the lower court ignored the *Roe* definition and apparently misread *Danforth*, where this Court had approved the Missouri statutory definition of viability as when life can be "continued indefinitely outside the womb. . . ." 428 U. S. at 63. This Court carefully noted in *Danforth* that the point of viability as defined in Missouri "may well occur later in pregnancy" than the point of viability as defined in *Roe*. *Danforth*, 428 U. S. at 64. Nevertheless, the lower court in the instant case held that "seemingly, the child was not viable in the sense that he could live indefinitely outside his mother's womb. . . ." (App. A, p. 3a).[3]

[3] This sentence, found in the opinion's statement of facts, is the court's only mention of why this infant was not viable. Nevertheless, the remainder of the opinion turns on this conclusion.

Thus the lower court went beyond the requirements of the Constitution, the decisions of this Court and the law of South Carolina by requiring that an infant must live "indefinitely" outside the womb before he might be deemed viable.

The court then compounded its error by creating a "wait-and-see" test to determine whether a child was capable of "indefinite" life. Rather than observing that birth weight and apparent gestational age of the infant at birth raised the inference that he had been potentially able to survive—as he did survive for 20 days in spite of the abortion—the lower court simply held that since he did not live, he was not viable in the first place.

At least two consequences flow from the decision of the District Court.

First, aside from the result in the instant case, the court's erroneous recitation of the *Roe* standard of viability has effectively foreclosed the state from enacting legislation which would be constitutional under *Roe*. Even though the State may properly assert its compelling interest in protection of those fetuses potentially, rather than indefinitely, able to survive abortion, such legislation is unlikely after the decision of the lower court. The legislature would be loath to enact a statute which would seem certain to be invalidated and which would lead to another hiatus in the State's valid efforts to proscribe nontherapeutic abortions after viability.

Second, the decision of the lower court encourages the physician to act contrary to the compelling interests of the state and of the viable fetus. If "indefinite" survival of an infant outside the womb is to be the constitutional standard of viability, a physician could insure "nonviability" and its accompanying constitutional immunity simply by employing that method of abortion least likely to assure survival.

The Constitution surely cannot be said to mandate a regulatory scheme which effects this result.[4]

Finally, the court overlooked the fact that once pregnancy advances to viability, at which point nontherapeutic abortion becomes subject to proscription, the act of performing the abortion procedure is itself defined in South Carolina as the criminal act, regardless of whether the fetus ultimately survives. §§ 44-41-10 (a), App. B, p. 8a.[5] This definition, which analogizes abortion to a crime of attempt, was not affected by *Roe*.[6] The definition stands in plain opposition to the court's reasoning, but was never even discussed.

B. **Questions concerning the application of the viability concept to these facts must await the development of the factual record.**

The lower court having erred in defining viability, there remains the factual issue of whether this fetus was viable under the *Roe* standard. The determination of this issue would be premature in light of the posture of the case, even if it were properly before the district court rather than the state courts. This case was before the lower court on motion for summary judgment; all the evidence was taken by depositions, by affidavit or by documentary evidence. Beyond its conclusion as to viability, which was

[4] In some cases, of course, the stillborn fetus might be so far advanced that its viability but for the abortion would not be subject to reasonable doubt by experts. The difficulties which the court's opinion raises, however, lie in the cases of doubt which will occur prior to the lattermost stage of pregnancy.

[5] The states do not uniformly define the act. Cf. Indiana Code, § 35-1, ch. 58.5(b); Illinois Revised Statutes, Ch. 38, § 81-22(6) (both making fetal survival irrelevant) and § 2(1) of the Missouri statute quoted in *Danforth*, 428 U. S. at 84 (destruction of the fetus a prerequisite).

[6] *Roe* only serves to limit the proscription of the procedure to the postviability period.

akin to a legal conclusion, the lower court made no findings of fact concerning the aborted fetus, nor did it make any determination as to which facts were in dispute.[7]

This Court has emphasized that viability is a medical concept to be determined through the judgment of the physician. *Roe*, 410 U. S. at 164; *Danforth*, 428 U. S. at 61-63. It follows that viability is an issue of fact to be proved through medical testimony, subject to cross-examination and impeachment. Yet, without findings of fact, the lower court apparently proceeded upon the irrebuttable presumption that if a fetus or infant dies subsequent to abortion he is "nonviable" as a matter of law.

It should be stressed that this infant weighed 1,049 grams at birth and that the medical textbook employed in *Roe* to illustrate general medical opinion as to viability states:

> Interpretations of the word "viability" have varied between fetal weights of 400 g (about 20 weeks of gestation) . . . Attainment of a weight of 1,000 g is therefore widely used as the criterion of viability. Infants below this weight have little chance of survival, whereas those over 1,000 g have a substantial chance. . . .
>
> L. Hellman & J. Pritchard, Williams Obstetrics 493 (14th ed. 1971).

J. Pritchard, Williams Obstetrics 493 (14th ed. 1971).

It may be that a finder of fact might conclude that the aborting physician's medical judgment was not intentionally directed or wantonly negligent toward abortion of a viable fetus. It may be that a finder of fact would conclude that the infant was not viable when the abortion was per-

[7] In addition, the record was developed only on the question of prosecutorial bad faith, as the district judge initially directed (Transcript of Hearing, 9/17/75, found in "Louise Doe" Dep. p. 60). Cases such as *Cameron v. Johnson*, 390 U. S. 611, 621 (1968) have held that the federal inquiry as to bad faith does not turn on the sufficiency of the evidence at the state level. Accordingly, the prosecutor did not attempt to produce all possible medical evidence as to viability.

formed. But in view of clear medical evidence that this infant may have been viable, these questions must at least await cross-examination of Dr. Floyd's affiants, if not remand to the state court for a full exposition of the evidence.

II. The District Court should have abstained pursuant to Younger v. Harris, 401 U. S. 37 (1971).

A. A state criminal proceeding was pending before any federal proceeding of substance took place. [8]

As the chronology of events set forth in the Statement (pp. 8-9, supra) reveals, the indictment had been presented to the grand jury and voted on by it on the morning of August 28, 1975, all before the prosecutor was served with the complaint and temporary restraining order.[9] At 3:00 in the afternoon of the same day, a hearing on the question of the issuance of a temporary injunction was held before the district judge. The prosecutor was present and represented himself at this hearing, which lasted about an hour and culminated in the issuance of the temporary injunction. On the question of the pendency of the state proceeding, the following exchange took place:

> Mr. ANDERS: I have previously submitted this matter to the Grand Jury, Your Honor, because this was not served upon me until after it had been submitted. It has gone to the Grand Jury and I am waiting for them to return at this time. I don't want you to think that I'm . . . .

[8] This question, about which the court expressed an opinion, App. A, p. 2a, but did not deem it necessary to reach, is logically discussed first.

[9] Evidence of the absence of notice to the prosecutor prior to the submission of the case to the grand jury is in the record (Transcript of Hearing, 8/25/75, p. 29), and has not been disputed.

> The COURT: Where the law refers to an ongoing criminal prosecution, and this one hasn't gotten to that stage yet. So I will issue the Order . . . .
>
> Transcript of Hearing, 8/25/75 p. 29.

Assuming without conceding that the hearing on the afternoon of August 25, 1975, was a "proceeding of substance" (*Hicks v. Miranda*, 422 U. S. 332, 349 (1975)) in the federal court, that proceeding still did not take place before the prosecution had commenced.

The State court's procedural mechanism had already begun to run with the presentation of the case to the grand jury and had gone past a mere beginning with that body's immediate vote to return an indictment before the first proceeding of substance in federal court had occurred, and indeed before the federal complaint had ever been served on any state official. The plaintiff's only hope of escaping the *Younger* doctrine is to argue, as he did below, that the state proceeding did not become a pending one until the indictment was formally returned in open court the day after the hearing in the district court. The contention appeals only to dry logic. Once the matter had been submitted to the grand jury and voted upon, the State's interest in the proceeding had obviously attached, and few actions short of halting a state criminal trial could have disrupted it more. The only action which the prosecutor could have taken to "withdraw the indictment," as he was orally ordered to do by the district judge, would have been to enter the grand jury room or to call out the grand jury and ask that the already-voted-on indictment be handed over

and destroyed.[10] Aside from the immediate offense which this would have given to all concerned, it would have also required a duplication of the grand jury's efforts by another body should the plaintiff's federal suit ultimately fail.

This Court has declined to rely on merely formal requisites of procedure in determining whether a state or federal proceeding has begun; the primary instance of such a rule is found in *Hicks*, which held that federal proceedings began not with the formal filing of a complaint, but instead only when a "proceeding of substance" had taken place. The purpose of the *Younger* rule, of course, is to prevent federal injunctions which would constitute "an offense to the State's interest" in its proceedings, *Huffman v. Pursue, Ltd.*, 420 U. S. 592, 604 (1975), and the "disruption of suits by the State in its sovereign capacity." *Trainor v. Hernandez*, 431 U. S. 434, 446 (1977). Thus when a state official takes an action which announces his intent to commence a state proceeding and which actually places the case before the state court, the State interest which *Younger* intended to protect is present.[11]

In a number of cases, it has been held that the State's interest in a criminal proceeding attaches prior to indictment, with the courts accordingly dismissing federal actions

[10] Dr. Floyd argued below that the prosecutor should have complied with the literal terms of the district judge's initial order, *i.e.*, that he should have withdrawn the indictment. The lower court impliedly rejected this contention; its final order, entered on December 20, 1977, simply enjoins the prosecutor "from proceeding to prosecute [Dr. Floyd] on any of the charges contained in the indictment returned August 29, 1975" and from seeking any new indictment on the same facts. The prosecutor has taken no action against Dr. Floyd since the court's oral order on August 28, 1975, over two years before the injunction became permanent.

[11] Such action also moves the case away from the principles enunciated in *Steffel v. Thompson*, 415 U. S. 452 (1974), and *Doran v. Salem Inn*, 422 U. S. 922 (1975). In both, a state prosecution against the federal plaintiffs would or might have occurred only if they repeated the conduct which they alleged was protected and thereby suffered arrest and the filing of new criminal charges. Dr. Floyd, on the other hand, was made certain before any federal hearing took place that he would be prosecuted for his single past act. If the grand jury had not returned indictments, of course, the question of Younger's application would have been mooted; see *Steffel*, 415 U. S. 452, 463 n. 12.

brought by the state defendant. See, e.g., *Lewis v. Kugler*, 446 F. 2d. 1343, 1348 (3rd Cir. 1971) (state proceeding had not gone beyond searches and seizures); *Notey v. Hynes*, 418 F. Supp. 1320, 1326 (E. D. N. Y. 1976) (grand jury investigation); *Oldroyd v. Kugler*, 352 F. Supp. 27 (D. N. J. 1973) (arrest).[12] As to proceedings being deemed "pending" prior to indictment in other contexts, *see, e.g., State v. Ensor*, 277 Md. 529, 356 A. 2d 259 (1976); *U. S. v. New Departure Mfg. Co.*, 195 F. 778 (W. D. N. Y. 1912); Annot., 122 A. L. R. 670. Moreover, in *Hicks*, for example, the state proceeding was initiated with only a unilateral act by a state official, such as the filing of a criminal complaint.[13] *See also, Munson v. Janklow*, 563 F. 2d 933 (8th Cir. 1977). No distinction exists between such a unilateral act and submitting a proposed indictment to a grand jury with a reasonable belief that probable cause to indict exists. The State's interest was triggered in this case as in those, and the State proceeding accordingly should not have been enjoined.

B. The prosecution was not brought in bad faith.

The district court, as noted earlier, assumed without deciding that a state prosecution was pending. It held nevertheless that the prosecution could be enjoined because in the court's view it was brought in bad faith:

> Had the prosecutor but read the opinion for the majority in *Roe v. Wade*, he would have known that the fetus in this case was not a person whose life state law could legally protect.
>
> • • •

[12] Cf. *Dombrowski v. Pfister*, 380 U. S. 479, 484, n. 2 (grand jury not convened before federal complaint filed).

[13] State constitutional provisions which require that a defendant be charged by indictment (see, e.g. South Carolina Constitution, Art. I, Sec. 11) are generally held not to affect the question of whether a prosecution has begun or is pending. See e.g., *State v. Williams*, 192 La. 713, 189 So. 112 (1939).

> Since the prosecutor was chargeable with knowledge of what the Supreme Court had done and said in *Roe v. Wade*, his decision to proceed to seek and obtain indictments of Dr. Floyd, in the face of that knowledge, cannot have been in good faith.
>
> App. A, p. 6a.

In other words, the prosecutor should have known that under *Roe*, this fetus was not viable. However, it has been demonstrated above that the court itself misapplied *Roe* in defining viability and that the question of whether the fetus was "potentially able to live outside the womb. . ." remains to be decided in fact and in law. If the court's definition of viability was in error, its finding of bad faith must also fall.[14]

Building upon the above holding and assuming that the prosecutor knew this fetus to be nonviable, the court imputed to him a theory of the prosecution which he never formulated, namely that a prosecution for the abortion of even a nonviable fetus was possible because the abortion was performed after the twenty-fourth week:

> We cannot fault the prosecutor for thinking that it would not be unreasonable for a state to proscribe all abortions after the twenty-fourth week.
>
> App. A, p. 5a.

The prosecutor never in fact viewed the case in this way, because he was proceeding on the assumption that the fetus was viable. At the first hearing in the district court, the day after this action was commenced, he told the court:

> [C]ertainly we feel that the fetus was viable in light of the definition given [by § 44-41-10(l)] and the fact that the child did live for some twenty days.
>
> Transcript of Hearing, 8/28/75, p. 17.

[14] Both the lower court and plaintiff's counsel have noted that the prosecutor had read only a synopsis of *Roe* rather than the opinion itself. While this adds a surface luster to plaintiff's claim of bad faith, the fact is that a reading of *Roe* would not have led one to believe that the prosecution was futile, and it still does not.

The court inexplicably ignored this statement, as well as the prosecutor's contention before the three-judge court (after *Danforth*) that the statute should be construed so that "prosecutions could *not* be based upon abortions performed on nonviable fetuses." (Br. for Defendant, p. 9; emphasis added.)

The state proceeding was a prosecution for the abortion on a fetus believed by the prosecutor to be viable. The correctness of this belief has been challenged by Dr. Floyd, but as noted above, the success of this challenge turns on unresolved questions of fact. Admittedly the prosecutor also originally was concerned with the number of weeks of pregnancy involved, but in late 1975 when the prosecution began, this approach was being argued for by physicians (*Danforth*, 428 U. S. 52, 63) and it could not have been predicted with certainty that the argument would fail.[15] To hold, as the lower court did, that a careful reading of *Roe* would reveal fatal defects in the number-of-weeks approach, would be to hold the prosecutor to a standard of rare if not unprecedented prescience, and even so would not defeat the alternative ground, viability, on which the prosecution was pending.

C. South Carolina's abortion statute may be construed to prohibit only abortions after viability.

The lower court incorrectly concluded that this case constituted an exception to *Younger v. Harris*, *supra*, in that § 44-41-20 (c), as apparently construed by the court, was facially unconstitutional. While *Younger* held that a prosecution under a defective statute might be enjoined "even in the absence of . . . bad faith and harrassment," 401 U. S. at 53, the statute's defect must go beyond mere facial unconstitutionality, with the statute being instead "fla-

[15] At least one model act, drafted by students at Vanderbilt Law School, followed the same approach. See Abortion after Roe and Doe: A Proposed Statute, 26 Vand. L. R. 823 (1973).

grantly and patently violative of express constitutional prohibitions, in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." 401 U. S. at 53-54, quoting *Watson v. Buck*, 313 U. S. 387. This standard (which this Court has never applied to enjoin a prosecution) is not met by a mere conclusion of possible facial invalidity, 401 U. S. at 54, and the lower court never explicitly held that facial unconstitutionality existed. Instead, it confused this exception to *Younger* with another one, bad faith, intertwining the two to make the whole greater than the sum of its parts.[16] The court, whose opinion is quoted in the footnote, simply omitted the greater part of the *Younger-Watson* definition of "flagrant and patent" unconstitutionality.[17] The end result is that the court has failed to inform South Carolina's officials whether § 44-41-20 (c) has been deemed invalid in every conceivable application or only as applied in this instance.[18] The ensuing confusion means that the statute will either have to be amended (although the court might not have actually thought amendment necessary) or prosecutions for abortions performed after viability will have to be foregone.

The all-inclusive invalidity of the sort required by the *Younger-Watson* test is simply absent here, and the prosecution thus was erroneously enjoined.[19] The statute is constitutional as applied to abortions performed after viability, and may be construed by the state courts to insure that it applies only to such abortions. Thus, even if *Younger* principles did not apply (*i.e.*, if no state proceeding were deemed pending), the traditional abstention doctrine set forth in cases from *R. R. Commission v. Pullman*, 312 U. S. 496 (1941) to *Bellotti v. Baird*, 428 U. S. 132 (1976) would necessitate the federal court's staying its hand while the state courts were given the opportunity to so construe the statute.[20]

Section 44-41-20 (c) proscribes abortions "[d]uring the third trimester of pregnancy" (defined in § 44-41-10 (k) as beginning with the twenty-fifth week after conception) unless the attending physician certifies that it is necessary to protect the life or health, including mental health, of the mother.[21] Although the statute read in its most literal sense would appear to conflict with language in the holding of

[16] See *Hicks*, where it was noted that no inference of bad faith may be drawn from the enforcement of an unconstitutional statute. "Otherwise, bad faith and harrassment would be present in every case in which a state statute is ruled unconstitutional and *Younger v. Harris* would be swallowed up by its exception." 422 U. S. 332, 352.

[17] "Under *Younger*, abstention may be required if the state prosecution is under a statute of only questionable constitutionality, but *Younger* makes it plain that the bad faith or harrassment exception is applicable when the state criminal proceeding is under a state statute which is 'flagrantly and patently violative of express constitutional prohibitions * * *.'" App. A, p. 6a.

[18] The court seems to say that it is only invalid as applied (App. A, p. 4a); but if this is the case, the court should have abstained, because inferably the statute was not unconstitutional "in whatever matter and against whomever. . . ."

[19] In *Roe v. Wade*, 410 U. S. at 126-127, the court refused to enjoin a state prosecution under the Texas abortion statute which was declared unconstitutional in every respect.

[20] As in *Baird*, the state's highest court has a rule (South Carolina Supreme Court Rule 20(1)) which permits it to take original jurisdiction of cases in which, inter alia, "the public interests are involved." *Id.* While this is not a rule for the certification of issues from the federal courts as in Massachusetts, it has been liberally invoked by the State Supreme Court, most recently in a case in which the Federal District Court abstained pursuant to *Pullman*. *University of South Carolina v. Batson*, No. 78-014, South Carolina Supreme Court (involving state university's mandatory retirement age).

The need for abstention under the *Pullman* doctrine (which arises only if no state proceeding were pending) also means that the lower court should not in any event have permanently enjoined the prosecutor from acting. A temporary injunction pending state court interpretation of the statute in a separate civil action would have protected Dr. Floyd without simultaneously precluding all enforcement of the statute against physicians who might perform post-viability abortions. (No other physician has sought declaratory relief concerning the statute's constitutionality and if a prosecution is pending against Dr. Floyd, he may not bring an independent declaratory judgment action in the role of a "potential future defendant." *Roe*, 410 U. S. at 126).

[21] The section also contains spousal consent and consulting-physician requirements which were held invalid in a separate portion of the opinion dealing with matters not necessary to the prosecution (App. A, p. 7a). As noted above (p. 2), these determinations have not been appealed.

Planned Parenthood v. Danforth,[22] the state court would not be confined to such a reading in affording the statute a constitutional construction; *see, Boehning v. Indiana State Employees Ass'n*, 423 U. S. 6, 7 (1975); *Lake Carriers Ass'n v. MacMullan*, 406 U. S. 498 (1972); *see also, U. S. v. Thirty-Seven Photographs*, 402 U. S. 363 (1971; federal statute). In addition, the state court in construing the statute would have before it a statutory definition of viability which is practically a verbatim quotation from *Roe v. Wade*. § 44-41-10 (l) provides:

> Viability means that stage of human development when the fetus is potentially able to live outside of the mother's womb with or without the aid of artificial life support systems. For the purposes of this chapter, a legal presumption is hereby created that viability occurs no sooner than the twenty-fourth week of pregnancy.

With the concept of viability thus clearly spelled out in the statute, the state court could limit the prohibition of § 44-41-20 (c) to post-viability abortions by construing the word "during" in "during the third trimester" to mean "at some point in the course of," i.e., the point after viability, rather than the more common (but not the exclusive) meaning which implies "throughout the entire time of." This meaning has been given to the word in a number of contexts (*see, e.g. American Linseed Co. v. Eberson*, 126 Mo. App. 426, 104 S. W. 121 (1907) (involving interpretation of a contract); *Christie Lowe and Heyworth v. Patton*, 148 Ala. 324, 42 So. 614 (1906) (interpretation of a contract); *Kiddle v. Kiddle*, 90 Neb. 248, 252, 133 N. W. 181 (1911) (interpretation of a statutory provision, "during its pendency" means "any time from the commencement of the

[22] "In any event, we agree with the District Court that it is not the proper function of the legislature or the courts to place viability, which essentially is a medical concept, at a specific point in the gestation period." 428 U. S. 52, 64.

suit until and including the final order of dismissal. . ."); *U. S. v. Ammerman*, 176 F. 635, 636 (1910); (indictment for perjury).

The availability of this construction to the state courts suggests that this is a "paradigm case for abstention," *Lake Carriers' Ass'n v. MacMullan*, 406 U. S. 498, 510 (1972) because "the challenged state statute is susceptible of 'a construction by the state courts that would avoid or modify the (federal) constitutional question.'" *Id.* Where a state proceeding is pending as here, *Younger* principles compel the application of such abstention principles *a fortiori*.

Moreover, the draftsman of the act, whose deposition is in evidence, testified that the statute was not intended to prohibit the abortion of nonviable fetuses, even if such abortions were performed in the third trimester:

> [A]s I saw it, the viability requirement of [§ 44-41-10 (l)] said a legal presumption is created that viability occurs no sooner than the 24th week which leaves open the alternative that if a child is delivered, let's say, from 24 to 28, the fetus is not viable then you still have that legal defense available to you although it was a third trimester abortion, and you did not have to concern yourself with was it viable or not viable. *It is not presumed viable.* In other words, it is not presumed viable if it happens in the first two trimesters.[23]
>
> Saleeby Dep., p. 17 (emphasis added).

As the draftsman later testified, a physician who aborts after the 24th week might be subject to *prosecution*;[24] but

[23] This testimony was given in September, 1975, almost a year before this Court's decision in *Danforth*, and at a time when it was by no means certain that a state could not create a presumption that viability occurred after a set number of weeks. Nevertheless, the draftsman did not attach that presumptive effect to the statute.

[24] "Q. [By Mr. Lucas]: But if the physician has a case of a patient who is 26 weeks, for example, and he goes ahead and does the abortion thinking there is not a viable fetus. He is nonetheless liable to criminal prosecution, is he not?

A. For not complying with what was written to be a reasonable restriction on that. In that case then he would be subject to prosecution because he didn't comply with regulations." Saleeby Dep., p. 42.

his remarks quoted above indicate that nonviability would be a complete defense. Even before the need for a construction of the statute to prohibit only post-viability abortions became certain (i.e., before *Danforth*), the physician probably would have faced no greater likelihood of prosecution than one who performed an abortion under the Missouri statute approved in *Danforth,* for instance. It is thus apparent that the statute may be construed in accordance with *Roe,* and that the lower court erred in not abstaining under either *Younger* or under traditional abstention doctrines.

D. **The application of the law of homicide to this case is a question of state law.**

In this case, as already noted, there is an abundance of evidence that the fetus in question was viable when aborted. When it was born alive, moreover, it became a "person", as *Roe v. Wade,* 410 U. S. at 158, 161, 162, itself implies. The possible viability of the fetus in itself puts the case beyond the parameters of *Roe,* which limited the states' power to proscribe abortions (except therapeutic abortions) only before viability.[25]

The only question which the homicide indictment presents, therefore, is whether homicide can be predicated on injuries inflicted before birth. This is essentially a state-law question involving the definition and classification of possible criminal acts. *Roe* extends protection to postviable fetuses, whether deemed "persons" or not, and whether they survive the abortion procedure or not. If a state may prohibit nontherapeutic acts harmful to postviable fetuses, the state may also define such acts as a crime if it does so rationally.

[25] If a physician *thought* a fetus to be previable but it was nevertheless born alive, the reasonableness of the belief would presumably determine whether a prosecution were to be brought and what its chances of success would be.

The rule that a prenatal act resulting in the eventual death of a liveborn infant constitutes homicide is to be found in the common law.[26] *See, e.g., R. v. Brain,* 6 Car. & P. 350, 172 Eng. Rep. 1272 (1834); *R. v. West,* 2 Car. & K. 784, 175 Eng. Rep. 329 (1848); *Clarke v. State,* 117 Ala. 1, 23 So. 671 (1898); *Morgan v. State,* (48 Tenn. 417, 256 S. W. 433 (1923)), although the states have not unanimously adopted the rule.[27] *See, e.g., Commonwealth v. Edelin,* 359 N. E. 2d 4, 12 (1976). Unlike the numerous abortion statutes which were enacted in the mid-nineteenth century at least partly to protect the mother's health, *Roe,* 410 U. S. at 148-158, the common law homicide doctrine appears to have been grounded in large part on the fact that a "person" had been killed: live birth is the basis on which the doctrine turns.[28] The cases and commentators make little or no mention of the mother's health.

The lower court's brief conclusion as to the homicide indictment, like its conclusions about the prosecution for abortion, was based on an assumption that the fetus was not viable. Because this is not necessarily the case, and because no case has held that the Constitution precludes a homicide prosecution under these facts, the state court under either *Younger* or *Pullman* should determine whether the common law of homicide will be applied.

[26] Apparently no South Carolina case has reached the issue although murder is a common law offense, *State v. Judge,* 208 S. C. 497, 38 S. E. 2d 715 (1946).

[27] When these cases were decided, abortion was also a crime under the statutes of the respective jurisdictions. See 43 Geo. 3, Ch. 58 (1803); Ala. Acts. ch. 6 § 2 (1840-1841); Tenn. Acts. ch. CXL, §§ 1, 2 at 188-189 (1883).

[28] See, *e.g. Rex v. Brain, supra:* "A child must be actually in the world in a living state to be the subject of murder."

CONCLUSION

For the foregoing reasons, it is submitted that this Court has jurisdiction over the appeal, that the lower court has significantly abridged the State's interest in viable fetuses and in its court proceedings, and that the case should be set for plenary review.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

[FILED
November 4, 1977
MILLER C. FOSTER, JR., Clerk]

Civil Action No. 75-1481

JESSIE J. FLOYD, M.D., PLAINTIFF,

versus

JAMES C. ANDERS, Solicitor of Richland County,
DEFENDANT

THREE-JUDGE COURT

Before HAYNSWORTH, Chief Circuit Judge, RUSSELL, Circuit Judge, and CHAPMAN, District Judge

---

HAYNSWORTH, Chief Circuit Judge:

In this action, a physician specializing in abortions sought to enjoin his prosecution in a state court on charges of committing an illegal abortion and of murder.

At the time the complaint was filed, the state prosecutor was actively seeking indictments arising out of the death of a male child twenty days after its delivery as a result of an abortion. The grand jury voted to return an indictment for murder and an indictment for performing an illegal abortion on the same afternoon that the single district judge, after a hearing, issued a temporary restraining order, but the indictments were not returned in open court until the next day.

I.

At the outset we are met with the contention by the defendant that under the doctrine of *Younger v. Harris*, 401 U. S. 37, we should abstain. Here, the federal complaint was filed before the indictments, and the temporary restraining order issued on the same afternoon during which the grand jury voted to return the indictments and the day before the indictments were actually returned in open court, so the literal holding of *Younger* is inapplicable. The defendant contends, however, that the principle applies since no "proceeding of substance on the merits" had taken place in the district court before the prosecution was commenced. *Hicks v. Miranda*, 422 U. S. 332. But *see, Doran v. Salem Inn*, 422 U. S. 922. One would suppose that the actual issuance of a temporary restraining order, after a hearing, was a proceeding of substance in the district court within the meaning of *Hicks*, but we need not stand on that ground, for it clearly appears that the state prosecutor was not proceeding in good faith, in the legal sense of the well-established exception to *Younger v. Harris*.

II.

This controversy grew out of a grisly and gruesome business.

Louise, a young, pregnant woman wished an abortion because her expectancy interfered with her hopes and plans to go to college. In July 1974, she went to plaintiff's clinic where, according to the affidavit of the plaintiff's nurse, Louise told the nurse that she was in the twelfth week of her pregnancy and gave the nurse $175, the amount of the plaintiff's fee for an abortion. The nurse checked Louise's blood pressure and pulse and administered pre-operative medication. An "instrument technician," employed by the plaintiff, escorted Louise to the "procedure room." There Louise was examined by Dr. Floyd, who determined that she was in the twentieth week of her pregnancy, not the twelfth, and that the abortion could not be accomplished by the currettement procedure which had been contemplated by the nurse.

According to the nurse's affidavit, Louise was visibly upset when told the abortion could not be accomplished in the clinic and that to accomplish it in the hospital would cost approximately $450, rather than $175, since the hospital's charges must be included. She was given a refund of $150 out of the $175 she had paid, but she did not have $450.

A week and one-half later, Louise telephoned the nurse and informed her that she had procured the necessary money, and she was given an appointment for a checkup by Dr. Floyd on August 21. Louise failed to keep that appointment, but was admitted to the hospital on September 3.

The next day, five weeks after his estimate of the fetal age from the time of conception as being twenty weeks, Dr. Floyd injected prostaglandin into Louise's uterus which later caused successive contractions and expulsion of the fetus.

The male fetus was alive at the time of delivery. Under the care of the hospital personnel, he continued to live for twenty days. This suggests that Dr. Floyd's estimate that Louise was in the twenty-fifth week of her pregnancy at the time of the abortion was accurate. Seemingly, the child was not viable in the sense that he could live indefinitely outside his mother's womb, but he did have the capacity to live for twenty days, as he did.

When an abortion occurs in the early weeks of pregnancy so that the fetus may be thought not to be alive once it was expelled from the womb or so that it dies in a moment and without a murmur, there may be little cause for revulsion. It seems quite different when an abortion is performed when the child has long since quickened and comes into the outside world with a strong heart beat and its lungs functioning. Differences are aggravated when it takes the child three weeks to die.

III.

In the circumstances of this case, it may be thought that the Constitution would permit a state some measure of discretion in regulating or proscribing late-term abortions without regard to viability, which may be impossible to determine when the child is in the womb. The Supreme

Court has clearly decided, however, that the state has no such discretion and that a state statute such as South Carolina's, which proscribes abortion after the twenty-fourth week of conception,[1] is unconstitutional in its application if the aborted fetus is not viable.

In *Roe v. Wade,* 410 U. S. 113, and *Doe v. Bolton,* 410 U. S. 179, the Supreme Court clearly stated the constitutional right of the expectant mother to terminate her pregnancy at any time up until the moment the child becomes viable. Solely in the interest of the health of the mother, it is subject to some regulation by a state during the mid trimester and the first part of the third trimester before viability as to such things as to who may perform abortions and where. Otherwise, the right of the mother to rid herself of an unwanted fetus is comparatively unfettered. That choice, said to spring from a right of privacy or of personhood or from her right to determine her own lifestyle, is surely one of great importance to her. It is so personal to the woman that it is said by the Supreme Court the state may not constitutionally encumber it with requirements of the consent of a husband, if there is one, or of parents, if the mother is young and unmarried. Indeed, the Supreme Court has clearly held that the state may not require a physician who has agreed to perform the abortion to consult another physician. The choice is solely that of the woman with such advice as she seeks or receives from the physician she chooses.[2]

In *Roe v. Wade,* 410 U. S. 113, the Supreme Court explicitly held that until a child becomes viable, the state's only interest in regulating abortions stems from its concern with the mother's health. Until that time, but after the first trimester, the state may regulate the conditions under which abortions may be performed, but only as those conditions relate to the health of the mother. Until the child is viable, the mother's constitutionally protected right to choose to

[1] 33 S. C. Code Ann. 682, *et seq.*

[2] The opinions of the Supreme Court suggest an expectation that the woman's decision would be an informed one made after receiving from her physician advice that was both professional and paternalistic. From all that is disclosed in the affidavits in this case, Louise received no advice from the physician until, after the administrations of the nurse, she arrived in the "procedure room."

terminate her pregnancy or not to do so must be allowed by the state to prevail over any interest it may have in the preservation of fetal life. Indeed, the Supreme Court declared the fetus in the womb is neither alive nor a person within the meaning of the Fourteenth Amendment. In *Planned Parenthood of Central Missouri c. Danford,* [sic] 428 U. S. 52, 64, the Supreme Court explicitly said that viability of the child is a medical concept to be determined by the attending physician, and that a legislature may not place it at a "specific point in the gestation period."

This prosecution was begun before *Planned Parenthood,* but after *Roe v. Wade. Roe v. Wade* itself, however, made it clear that proscription of abortions was impermissible before the child became viable. The Court's notice of the fact that viability generally occurs around the twenty-eighth week of pregnancy, though it may occur sooner, made it clear that the Court was treating the question of viability as one of fact, thus preventing legislatures from arbitrarily fixing a particular date for viability. Viability must, under *Roe,* be determined on a fetus by fetus basis.

Thus, at the time these indictments were sought against Dr. Floyd, it should have been obvious to the prosecutor that there was no possibility of his obtaining a conviction that could have been constitutionally sustained. The difficulty was that the prosecutor had not read the opinion in *Roe v. Wade.* He had read about it in a magazine, and he had a digest of it prepared by a first-year law student which, in several respects, was quite misleading.

We cannot fault the prosecutor for thinking that it would not be unreasonable for a state to proscribe all abortions after the twenty-fourth week following conception. Some fetuses, the Supremt Court said in *Roe v. Wade,* attain viability by that time. Whether or not a child is viable may be difficult to ascertain prior to delivery, and the twenty-fifth week approaches the twenty-eighth week when most children do become viable, if not viable earlier. Thus, we need not upbraid the prosecutor for supposing that the Constitution reasonably might leave to the states some area of discretion in proscribing abortions at a time

when all fetuses are approaching viability, and when some have actually attained it.

The prosecutor, however, was chargeable with knowledge of what *Roe v. Wade* actually held, and he was not entitled to proceed on the basis of what he supposed the law to be without having read what the Supreme Court had said. Had he but read the opinion for the majority in *Roe v. Wade,* he would have known that the fetus in this case was not a person whose life state law could legally protect. If a state may not legislate for the protection and preservation of the life of such a fetus, it surely cannot make the surgical severance of the fetus from the womb murder under state law. But the prosecutor here sought and obtained an indictment for murder as well as an indictment for performing an illegal abortion, when that, too, was clearly foreclosed by *Roe v. Wade.*

IV.

Since the prosecutor was chargeable with knowledge of what the Supreme Court had done and said in *Roe v. Wade,* his decision to proceed to seek and obtain indictments of Dr. Floyd, in the face of that knowledge, cannot have been in good faith. Even if the indictments had been returned before the commencement of this proceeding, *see Younger v. Harris,* 401 U. S. 37, or even if the issuance of a temporary restraining order following a hearing was not regarded as a proceeding of substance in this court, *see Hicks v. Miranda,* 422 U. S. 332, abstention would be inappropriate and impermissible since the prosecution itself is not being pursued in good faith. *Kugler v. Helfant,* 421 U. S. 117. Under *Younger,* abstention may be required if the state prosecution is under a statute of only questionable constitutionality, but *Younger* makes it plain that the bad faith or harrassment exception is applicable when the state criminal proceeding is under a state statute which is "flagrantly and patently violative of express constitutional prohibitions • • •."[3] This was reiterated in *Kugler.* In the face of the Supreme Court's holding in *Roe v. Wade,* there was no basis for a reasonable expectation that a valid conviction of Dr. Floyd might be obtained either upon the

[3] *Id.* at 53.

indictment for murder or upon the indictment for performing an illegal abortion. That is enough to bring this case within the *Younger* exception.

V.

The South Carolina anti-abortion statute[4] also requires that the physician, before performing an abortion, consult other physicians, and there are requirements for obtaining the consent of the husband of a married woman and of the parents or guardian of a minor.[5] While not indicted for violating any such provisions, Dr. Floyd seeks a declaration of their unconstitutionality. Without such a declaration, he may be exposed to further proceedings or harrassment. Thus, he is entitled to such a declaration.

The provision for physician consultation was expressly declared unconstitutional in *Doe v. Bolton,* and comparable provisions for obtaining spousal and parental or guardian consent were expressly declared unconstitutional in *Planned Parenthood.* Thus, Dr. Floyd may not be proceeded against under any of those provisions.

VI.

With the filing of this opinion, we assume that the pending indictments will be dismissed, and that there will be no further attempt to enforce South Carolina's anti-abortion statute to the extent that it is now declared to be in violation of the Constitution of the United States. If it otherwise appears within thirty days of the filing of this opinion, an appropriate decree will be entered.

[4] S. C. Code § 32-682(c).
[5] S. C. Code § 32-683(b).

APPENDIX B

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV

> Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 1979 of the Revised Statutes of the United States, 42 U. S. C. § 1983 (1970):

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Code of Laws of South Carolina, 1976:

§ 44-41-10 (formerly § 32-681, 1962 Code, as amended):

As used in this chapter:

(a) *"Abortion"* means the termination of human pregnancy by any act, device, instrument, procedure, medicine, prescription or substance administered to or prescribed for a pregnant woman by any person, including the pregnant woman, with an intention other than delivery of a viable birth or removal of a dead fetus.

(b) *"Physician"* means a person licensed to practice medicine in this State.

(c) *"Department"* means the South Carolina Department of Health and Environmental Control.

(d) *"Hospital"* means those institutions licensed for hospital operation by the Department in accordance with the provisions of § 44-7-310 and which have also been certified by the Department to be suitable facilities for the performance of abortions.

(e) *"Clinic"* shall mean any facility other than a hospital as defined in subsection (d) which has been licensed by the Department, and which has also been certified by the Department to be suitable for the performance of abortions.

(f) *"Pregnancy"* means the condition of a woman carrying a fetus or embryo within her body as the result of conception.

(g) *"Conception"* means the fecundation of the ovum by the spermatozoa.

(h) *"Consent"* means a signed and witnessed voluntary agreement to the performance of an abortion.

(i) *"First trimester of pregnancy"* means the first twelve weeks of pregnancy commencing with conception rather than computed on the basis of the menstrual cycle.

(j) *"Second trimester of pregnancy"* means that portion of a pregnancy following the twelfth week and extending through the twenty-fourth week of gestation.

(k) *"Third trimester of pregnancy"* means that portion of a pregnancy beginning with the twenty-fifth week of gestation.

(l) *"Viability"* means that stage of human development when the fetus is potentially able to live outside of the mother's womb with or without the aid of artificial life support systems. For the purposes of this chapter, a legal presumption is hereby created that viability occurs no sooner than the twenty-fourth week of pregnancy.

§ 44-41-20 (formerly § 32-682, 1962 Code, as amended):

Abortion shall be a criminal act except when performed under the following circumstances:

(a) During the first trimester of pregnancy the abortion is performed with the pregnant woman's consent by her attending physician pursuant to his professional medical judgment.

(b) During the second trimester of pregnancy the abortion is performed with the pregnant woman's consent by her attending physician in a hospital or clinic certified by the Department.

(c) During the third trimester of pregnancy, the abortion is performed with the pregnant woman's consent, and

if married and living with her husband the consent of her husband, in a certified hospital, and only if the attending physician and one additional consulting physician, who shall not be related to or engaged in private practice with the attending physician, certify in writing to the hospital in which the abortion is to be performed that the abortion is necessary based upon their best medical judgment to preserve the life or health of the woman. In the event that the preservation of the woman's mental health is certified as the reason for the abortion, an additional certification shall be required from a consulting psychiatrist who shall not be related to or engaged in private practice with the attending physician. All facts and reasons supporting such certification shall be set forth by the attending physician in writing and attached to such certificate.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Civil Action No. 75-1481

JESSIE J. FLOYD, M.D., PLAINTIFF,

versus

JAMES C. ANDERS, Solicitor of Richland County,
DEFENDANT

ORDER

The Court has determined that an injunction is necessary to carry out and enforce the Order of the Three-Judge Court recently filed.

IT IS, THEREFORE, ORDERED that James C. Anders, the Solicitor for the Fifth South Carolina Judicial Circuit, be and he is hereby permanently enjoined from proceeding to prosecute the plaintiff Jessie J. Floyd, M.D., on any of the charges contained in the indictment returned August 29, 1975 charging Dr. Floyd with violation of the South Carolina Abortion Law, and said James C. Anders is further enjoined from seeking any new indictment against Dr. Floyd based upon the facts giving rise to and set forth in said indictment.

AND IT IS SO ORDERED.

/s/ ROBERT F. CHAPMAN,
United States District Judge.

December 20, 1977,
Columbia, South Carolina.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

[ORIGINAL FILED
January 10, 1978
MILLER C. FOSTER, JR., Clerk]

Civil Action No. 75-1481

JESSE J. FLOYD, M.D., PLAINTIFF,

versus

JAMES C. ANDERS, Solicitor of Richland County, his agents, successors, and those acting in concert with them, DEFENDANTS.

NOTICE OF APPEAL

To GEORGE C. KOSKO and ROY LUCAS, Attorneys for Plaintiff:

PLEASE TAKE NOTICE that the defendant, James C. Anders, hereby appeals to the Supreme Court of the United States from the order entered on December 20, 1977, enjoining him from prosecuting an indictment in the Richland County Court of General Sessions.

DANIEL R. McLEOD,
Attorney General,
C. TOLBERT GOOLSBY, JR.,
Deputy Attorney General,
KENNETH P. WOODINGTON,
Assistant Attorney General,
P. O. Box 11549,
Columbia, South Carolina 29211,
By: /s/ KENNETH P. WOODINGTON,
Attorney for Defendants.

January 9, 1978.
TRUE COPY
Test:
MILLER C. FOSTER, JR., Clerk,
/s/ MARGARET TRUESDALE,
By: Deputy Clerk.